

# A class of its own

How to respond to a class-action lawsuit **Interviewed by Sue Ostrowski**

**Y**our company has been hit with a class-action lawsuit. So what do you do next? The first thing is to remember that it's not like other lawsuits you may have faced, says J. Kevin Snyder, leader of the Class Action Defense Practice Group at Dykema Gossett PLLC.

"There are a number of things a company should do when it is served with any lawsuit, including conducting a prompt investigation, implementing a litigation hold, and objectively evaluating the case," Snyder says. "But for a class-action suit, there are a few things you need to add to that list as you develop a response to the complaint."

*Smart Business* spoke with Snyder about how to respond to a class-action suit and steps you can take to stop a suit in its tracks.

## What is a class-action lawsuit?

A class-action lawsuit is brought by one or more people on behalf of themselves and other similarly situated persons, typically against one defendant. The complaint must include a class definition that will identify the scope of those who fall within the class. For example, a class may be defined as 'all New York residents who bought widgets from Acme Stores within the last four years.'

## How should a business address a class-action lawsuit differently?

First, many class-action lawsuits involve consumers who have entered into contracts that provide for arbitration of their disputes. In a recent decision, the U.S. Supreme Court upheld the use of class action waivers in arbitration agreements. As a result, it is now more likely that a defendant will be able to require that the case proceed as an individual claim by way of arbitration, thereby avoiding the class action altogether. Defendants should carefully review the relevant contracts for arbitration clauses and then consider promptly enforcing those rights.

Second, while a defendant should always consider whether a case can be removed to federal court, there are benefits that are particularly important to defendants in class actions. It is therefore important in a class action to thoroughly consider all options for removal (diver-



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sity, federal question, pre-emption, etc.).

Finally, in addition to evaluating whether there are challenges to the sufficiency of the pleadings, in a class action one should also consider preemptively challenging whether the case is of the type that is suitable for class treatment. Courts are increasingly willing to entertain motions to strike or motions to 'de-certify' at an early stage and before the plaintiff moves for class certification. Once a defendant defeats the class claims, settlement is likely.

## How can a business minimize the expense of responding to a class-action lawsuit?

Recognize that a significant number of class-action cases are filed by individuals who sincerely believe they have been unfairly treated by the defendant. Often, however, their only interaction was through customer service. Because a single person can bring a class action on behalf of thousands of unnamed persons who were 'similarly situated' the first thing a company can do to minimize the expense in a class-action suit is try to avoid it in the first place by having excellent customer service.

Once a suit has been filed, and your investigation completed, one should con-

sider an early and informal fact exchange with the other side. I have resolved many class action cases at an early stage by sitting down with the opposing counsel, and explaining why I believe their case lacks merit. If you can, offer documents revealing holes in their case, and discuss other facts that might undermine their claims. If you can convince the opposing attorney that the suit is a long shot, that attorney is much more likely to abandon the case outright, or at least discuss an individual settlement in the early stages.

If you cannot dispose of the case at an early stage, recognize that most of your legal fees will typically come from discovery. You can minimize the costs of discovery by appointing a single contact person for your counsel to work with in locating relevant documents and witnesses. In addition, clients are often capable of doing much of the leg work themselves. Your attorneys don't always have to be the ones to sort through boxes of documents or storage cabinets to find relevant materials. If you can do those things in house, you will generally save a significant amount of money.

## What steps should a business take if its investigation reveals that the plaintiff's claims have merit?

First, take steps to modify or stop whatever the practice is. You don't want to continue a problematic policy or procedure, or continue manufacturing and selling a product that you've determined is defective or creates liability or exposure for you.

Second, explore settlement. If you are not concerned with follow on litigation, consider trying to settle the case on an individual basis. Alternatively, consider settling the case on a class wide basis by stipulating to certification for the purpose of settlement and negotiating an agreement that resolves the issue once and for all. If a decision is made to settle on a class basis, there are a number of ways to reach an agreement that fairly compensates the class while minimizing the economic impact on the client. It is far easier to structure a favorable settlement early on than after two or three years of heavily fought litigation. <<

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